No. 21,652

IN THE

United States Court of Appeals

For the Ninth Circuit

PAXTON TRUCKING COMPANY, a corporation, and WILLIAM EARL BAILEY,
Appellants,

vs.

THE CUDAHY PACKING COMPANY,
Appellee.

On Appeal from the United States District Court for the District of Nevada

BRIEF FOR APPELLANTS

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INDEX

	Page
Jurisdictional Statement	1
Statement of the Case	2
Specification of Errors Relied On	8
Questions Presented	8
Summary of Argument	9
Argument	9
I. Whether the court's finding that appellants were negligent was clearly erroneous	9
II. Whether any conduct of Bailey was the proximate cause of the collision	11
III. Whether the court's finding that John Walter Dodd was free from contributory negligence is clearly erroneous	13
A. A consideration under the doctrine of negligence per se	13
B. A consideration under the doctrine of range and vision	16
Conclusion	18
Table of Exhibits	Appendix

Table of Citations

Cases

	Pages
Burlington Transportation Company v. Wilson, 61 Nev. 22, 110 P.2d 211, 114 P.2d 1093	16
Graventa v. Graventa, 61 Nev. 407, 131 P.2d 513	10
Harvey v. Streeter, 81 Nev. 177, 400 P.2d 761	10
L.A. & S.L.R. Co. v. Umbaugh, 61 Nev. 214, 123 P.2d 224	13
Nuelsen v. Sorensen, 293 F.2d 454 (C.A. 9)	11
Rocky Mountain Produce v. Johnson, 78 Nev. 44, 369 P.2d 198	16
Smith v. Zone Cabs, 135 Ohio St. 415, 21 N.E.2d 336	14
Styris v. Folk, 62 Nev. 208 at 219, 139 P.2d 614	14
Tracy v. Pollock, 79 Nev. 361 at 364, 385 P.2d 340	16, 17
United States v. U.S. Gypsum Company, 333 U.S. 364, 92 L.Ed. 747	11
Vascacillas v. Southern Pacific Company, 247 Fed. 8 (C.A. 9)	9, 10
Week v. Reno Traction Company, 38 Nev. 285 at 297, 149 Pac. 65	11, 13

Statutes

N.R.S. 484.410	15
N.R.S. 484.400.1	15
28 U.S.C., Section 1291	2
28 U.S.C., Section 1332	2
28 U.S.C., Section 1441	2

Texts

171 A.L.R. 894	14
William L. Prosser, Law of Torts, Third Edition, page 191	14
Restatement, Second, Torts, Section 296(1)	9

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BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

This is an appeal from a money judgment entered November 18, 1966, by the United States District Court for the District of Nevada in favor of Appellee and against Appellants in the sum of $9,794.12, together with costs. (R. 46.) The underlying action was brought by Appellee on November 23, 1965 in the Sixth Judicial District Court of Nevada for the County of Humboldt and Petition for Removal therefrom to the United States District Court for the District of Nevada was filed January 3, 1966. (R. 2-11.) The bases for removal were that the United States

District Court had original jurisdiction under Title 28, U.S.C., Section 1332 and the action was one which Appellants were entitled to remove to it from the Nevada Court pursuant to Title 28, U.S.C., Section 1441, in that the matter in controversy exceeded the sum of $10,000.00 exclusive of interest and costs, and in that prior to and at all times since the commencement of the action the corporate Appellant had been incorporated under the laws of California, having its principal place of business there, Appellant Bailey had been and was a citizen of California, and Appellee had been incorporated under the laws of Maine, having its principal place of business in Arizona. (R. 1-2.)

Appellants, on November 28, 1966, filed timely Motions for New Trial and to Amend Findings of Fact, Conclusions of Law and Judgment. (R. 50-54.) The Court on December 27, 1966 entered its Order denying these Motions. (R. 57-58.) Appellants on January 4, 1967 filed a timely Notice of Appeal to this Court. (R. 60.) This Court's jurisdiction accordingly rests upon Title 28, U.S.C., Section 1291.

STATEMENT OF THE CASE

This is an action brought by Appellee against Appellants for property damage arising out of a collision between the motor vehicles of the parties on U. S. Highway 40, near Winnemucca, Nevada, on February 19, 1965.

Appellant William Earl Bailey, hereinafter called "Bailey", owned and operated a 1960 Peterbilt Tractor. (T. 113:14-25.) He hauled cargo with it under contract with Appellant Paxton Trucking Company, hereinafter called "Paxton". (T. 114:6-25.) On February 18, 1965, in Salt Lake City, Utah, Bailey attached his tractor to a Paxton trailer loaded with ten tons of steel and drove west into Nevada at dusk. In the early morning of February 19, 1965, he stopped in Winnemucca, Nevada, for coffee and then continued west. (T. 115:12-116:13.)

Shortly after leaving Winnemucca, his engine throttle cable came unhooked without warning, the acceleration foot pedal became limp and the engine began racing wildly. (T. 115:18-25; 153:16-19; 116: 18-21.) Thinking the throttle cable to be broken, Bailey turned off the engine to save it from damage, took the truck out of gear and coasted, looking for a place to pull off the roadway. (T. 118:6-19; 135:20-23; 116:21-117:5.)

The roadway in this vicinity was level and straight for a distance of nearly a mile. (T. 41:14 to 42:4; 55: 2-21; 90:7-22.) There were two lanes, one for traffic in each direction, each of which was approximately 17 feet wide. (Diagram, Plaintiff's Exhibit 4.) In addition there were oiled shoulders adjacent to the lanes which were nearly wide enough to accommodate a car. (T. 88:8-12.) Adjacent the shoulder to the westbound lane was a flat, "awfully sandy" area. (T. 108:3-6.) Adjacent the shoulder to the eastbound lane was a graveled

parking area 175 to 200 feet wide and 130 feet long, which fronted a motel business. (T. 25:18-25; 17; 116: 24-25.)

Bailey feared pulling off the road to his right (the flat sandy area), not trusting that terrain in wintertime. (T. 117:2-3; 136:12-19.) However, he was about to do so when he discovered the motel parking yard to his left, across the highway. (T. 116:23-25.) Thinking the ground there to be solid, and thinking there to be more room to permit him to be clear of the highway, he turned into the motel yard to his left. (T. 116:23-25; 117:3-8.) When he coasted to a stop he discovered that his truck was not clear of the roadway and he tried to start his engine. The starter was dead and he began frenzied, but unsuccessful, efforts to start the engine, both by use of the starter button and the solenoid. (T. 117:11-25.) As Bailey put it, "I was going crazy, because after seeing this trailer partially on the highway, I knew what my trouble was." (T. 7: 20-22.)

Opinions varied as to how much of the roadway was blocked by the trailer. Bailey estimated it as five feet of the eastbound lane only. (T. 117:24-25.) Appellee's driver, John Dodd, said it covered the eastbound lane and part of the westbound lane. (T. 42: 19-20.) Wayne Morrow, an eyewitness, said the backend of the trailer was out into the eastbound lane, not quite at a 90 degree angle to it, but could not say for sure whether it was sticking out into the westbound lane. (T. 89:6-9.) However, the physical facts developed at trial concerning the subsequent collision

with the trailer were that the left wheels of the eastbound colliding vehicle (owned by Appellee Cudahy Packing Company, hereinafter called "Cudahy"), were at point of impact in the eastbound lane, 6 feet 7 inches from the center line of the highway (T. 28:4-20); that the Paxton trailer had two rear axles (or tandem axles), the forwardmost of which was 6 feet 5 inches from the rear end of the trailer (T. 135:3-25); that the front of the Cudahy tractor at impact was as right angles with the right rear side of the Paxton trailer (T. 61:17-22; 62:5-7); and that the center of the front of the Cudahy tractor at impact was in line with the center of the forwardmost of the rear Paxton axles (T. 61:2-62:25). The inescapable inference is that the rear end of the Paxton trailer was stopped well into the eastbound lane, but clear of the westbound lane prior to impact.

As Bailey continued his frantic efforts to start his engine, Wayne Morrow drove up from the east, from Winnemucca, in his Pacific Motor Transport Tractor and Trailer. (T. 118:20-118a:15.) Morrow, a driver of several years of daily experience on this particular route, had seen the Paxton trailer's clearance lights sticking out in the road from a distance of a quarter of a mile away. (T. 85:2-11; 86:19-87:6.) He stopped his truck partly on the oiled shoulder and partly on the dirt adjacent the westbound lane, at a point 150 feet east of the stalled Paxton tractor. (T. 87:18-88:24.) Morrow and Bailey blinked their lights at one another, and then Bailey heard a truck coming from the west. (T. 118a:12-18.)

Morrow saw the lights of the oncoming Cudahy truck as it came off a hill a mile or just under a mile to the west. The lights were in the eastbound lane of traffic. (T. 90:7-22.) When the oncoming truck was halfway down the little hill, Morrow turned his lights off and on three times to warn its driver of danger. (T. 90:24-91:21.) The flashing of headlights on and off three times is a warning of danger in the trucking business. (T. 90-24 to 91:11; 119:10-14.) The oncoming Cudahy vehicle, its lights on low beam, blinked its lights to high beam, and then back down to low beam again. (T. 91:13-19.) As the Cudahy truck got closer Morrow observed the clearance lights on the Paxton trailer to give the series of three blinks. This time the oncoming vehicle was a quarter of a mile or more away. It gave no response to the signal. (T. 92:3-20.) When the Cudahy truck was still a quarter of a mile or more away, Morrow observed the clearance lights on the Paxton trailer to go out and remain off for what seemed to be about 30 seconds. (T. 100:13-16; 105:7-17.) It seemed to Morrow that this was done in order to get more juice to the Bailey tractor. (T. 105: 7-17.) Morrow then observed the Paxton trailer clearance lights to go on again when the Cudahy truck was still maybe "a couple of hundred or three hundred feet" away or "even farther than that, for that matter." (T. 100:20-101:9.)

Dodd, the Cudahy driver, apparently did not see the signals. The first he saw of the trailer was its reflector on the right side. (T. 58:28-59:3.) At trial Dodd answered the cross-examiner that when he first

saw the trailer, "It seemed like it was as close from me to you. I was right there." (T. 53:15-17.) Likewise, he had seen no signal from the P.M.T. truck (Morrow) until immediately prior to impact. What he then did see he did not consider to be a signal: "Just dancing up and down on his dimmer switch." (T. 56:15-19.) He saw this when, according to his best estimate, he was 200 feet away, very, very shortly before he put on his brakes. (T. 57:5-13.) That which caused him to put on his brakes was the sight of the trailer in front of him. (T. 57:14-16.) Until this moment the Cudahy driver was maintaining, and had maintained for the five minutes previous, a constant speed of 57 miles per hour. (T. 44:12 to 45:5; 54:25 to 55:1.) The speed limit in this vicinity was 55 miles per hour. (T. 20:13-15.)

Morrow gave no testimony concerning the use of his dimmer switch immediately prior to the collision. He did, however, state that he asked Dodd after the crash if he had seen his lights; that Dodd answered that he had but just figured there was a cow in the road. (T. 97:16-22; 99:7-13.) Dodd testified that he did not think that he made such a statement (T. 155: 6-10), but that he does remember Morrow saying, "I tried to warn you." (T. 64:3-11.)

The front of the Cudahy tractor collided with the right rear of the Paxton trailer, generally damaging the center and right side of the former. (T. 61:2 to 62: 15; Defendants' Exhibits D and E; Plaintiff's Exhibit 8.)

SPECIFICATION OF ERRORS RELIED ON

1. That the Court erred in finding that Appellants were negligent.

2. That the Court erred in finding that any negligence of Appellants was the proximate cause of damages to Appellee.

3. That the Court erred in finding that there was no contributory negligence on the part of John Walter Dodd, the agent of Appellee and driver of Appellee's truck.

4. That the Court erred in denying Appellants' Motion to Amend Findings of Fact, Conclusions of Law and Judgment.

5. That the Court erred in denying Appellants' Motion to set aside Findings of Fact, Conclusions of Law and Judgment, and to grant Appellants a new trial on the ground that the judgment is contrary to law.

QUESTIONS PRESENTED

1. Whether the Court's finding that Appellants were negligent was clearly erroneous.

2. Whether any conduct of Bailey was the proximate cause of the collision.

3. Whether the Court's finding that John Walter Dodd was free from contributory negligence is clearly erroneous.

   a. A consideration under the doctrine of negligence per se.

b. A consideration under the doctrine of range and vision.

SUMMARY OF ARGUMENT

Upon an examination of the entire record, there is no substantial evidence to support the trial Court's findings of Appellants' negligence, proximate cause and Appellee's freedom from contributory negligence. There is substantial evidence to support findings of Appellants' freedom from negligence, Appellee's contributory negligence and that the latter was the proximate cause of the collision. Therefore, the Court's findings are clearly erroneous and the judgment ought to be reversed.

ARGUMENT

I. WHETHER THE COURT'S FINDING THAT APPELLANTS WERE NEGLIGENT WAS CLEARLY ERRONEOUS.

> "In determining whether conduct is negligent toward another, the fact that the actor is confronted with a sudden emergency which requires rapid decision is a factor in determining the reasonable character of his choice of action." Restatement, Second, Torts, Section 296 (1).

This special application of the reasonable man rule, the so-called "sudden emergency" doctrine, has been applied by this Court relative to Nevada in the past. *Vascacillas v. Southern Pacific Company,* 247 Fed. 8 (C.A. 9).

Bailey was clearly confronted with a sudden emergency. His engine commenced racing wildly. (T. 115; 116; 153.) To preserve it he turned it off and coasted looking for a place to park. (T. 118; 135; 116.) Perhaps he might have parked safely by pulling off to his right, on the northerly side of the road, in the sandy area, but he had been stuck in soft dirt once before that day and he did not trust the terrain. (T. 108; 117; 136; 127.) He then saw, and turned for, solid ground to the left across the highway to its southerly side. His trailer failed to clear the highway. (T. 116; 117.) Events proved that he chose the less wise of two parking areas; he could safely have parked on his right as Morrow, the P.M.T. driver, proved was possible. (T. 108.)

And so Bailey, faced with a power failure and knowing that he must clear the highway, erred in thinking that as between two alternative parking areas he could reach the farthest distant and more desirable. Is that negligence? As this Court said in *Vascacillas, supra,* "One exposed to sudden danger is not chargeable with negligence simply because he does not adopt the safest course to avoid injury." *Vascacillas v. Southern Pacific Company, supra* at page 12.

True, the trial Court, sitting without a jury, has found Appellants negligent. And true, Nevada has consistently adhered to the rule that such findings will not be disturbed on appeal when supported by substantial evidence even though substantial evidence may exist against such a finding. *Graventa v. Graventa,* 61 Nev. 407, 131 P.2d 513; *Harvey v. Streeter,* 81 Nev.

177, 400 P.2d 761. However, when it appears to the reviewing Court, after an examination of the entire evidence, that a finding is clearly erroneous then such finding cannot stand notwithstanding there is some evidence to support it. *Nuelsen v. Sorensen,* 293 F.2d 454 (C.A. 9).

> "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been committed." *United States v. U. S. Gypsum Company,* 333 U.S. 364, 92 L.Ed. 747.

The Nevada and Federal decisions relating to findings and evidence can be reconciled for application to this case: If indeed the choice of the poorer of two parking places when faced with a runaway engine is evidence of negligence, it is not, after an examination of the record, substantial. Therefore, the finding is clearly erroneous and ought to be discarded. The Court is urged the judgment should be reversed.

II. WHETHER ANY CONDUCT OF BAILEY WAS THE PROXIMATE CAUSE OF THE COLLISION.

In the case of *Weck v. Reno Traction Company,* 38 Nev. 285 at 297, 149 Pac. 65, the Court adopted the classic definition of proximate cause with this language:

> "That only is a proximate cause of an event, juridically considered, which, in a natural sequence, unbroken by any new and intervening

> cause, produces that event, and without which that event would not have occurred. It must be an efficient act of causation separated from its effect by no other act of causation. If, after an act of omission constituting negligence on the part of one injured at a railroad crossing, the railroad car or cars might have been so controlled by the exercise of reasonable care and prudence on the part of those in charge of them, as to avoid the injury, then a failure to exercise such care and prudence would be an intervening cause, and so the Plaintiffs' negligence no longer a proximate cause, and therefore not a bar to his recovery."

Was it negligence to choose a parking place unwisely? If so, did it proximately cause the collision? Or was it negligence to rely on the P.M.T. truck (Morrow) to do the signaling? If so, did it proximately cause the collision? As to the latter, Morrow *did* signal for Bailey (T. 90), but to no avail. Appellee's driver saw no signal until he was within 200 feet of the collision. (T. 57.) And so neither the wisdom of Bailey's frenzied choice of a parking place in an emergency situation nor of permitting the P.M.T. truck to do the signaling while Bailey continued his frantic efforts to start his truck, can be said to have proximately caused the crash. This is so because a warning signal of the danger was given and available to be seen by Appellee's driver and agent. It was ahead of him on the open roadway and he did not see it.

> "A person of normal faculties of sight and hearing is presumed to have heard and seen that which was

within the sight and range of vision." *L.A. & S. L.R. Co. v. Umbaugh,* 61 Nev. 214 at 236, 123 P.2d 224.

How applicable Dodd's conduct is to the early definition of proximate cause in *Week v. Reno Traction Company, supra.* The third sentence of the quoted language from that opinion might be paraphrased thus: If, after an act of negligence on the part of Bailey, the Cudahy truck might have been so controlled by the exercise of reasonable care and prudence on the part of Dodd, as to avoid the collision, then a failure to exercise such care and prudence would be an intervening cause, and so Bailey's negligence no longer a proximate cause and therefore not a ground for recovery against him.

The Court is urged that the Court's finding that negligence on the part of Appellants was the proximate cause of damages to Appellee is clearly erroneous.

III. WHETHER THE COURT'S FINDING THAT JOHN WALTER DODD WAS FREE FROM CONTRIBUTORY NEGLIGENCE IS CLEARLY ERRONEOUS.

A. A Consideration Under the Doctrine of Negligence Per Se.

Prosser defines negligence per se as

"the standard of conduct required of a reasonable man (which is) prescribed by legislative enactment. When a statute provides that under certain circumstances particular acts shall or shall not be done, it may be interpreted as fixing a standard for all members of the community, from which

it is negligent to deviate." William L. Prosser, Law of Torts, Third Edition, page 191.

The question whether this doctrine is applicable to contributory negligence is put in an article found at 171 A.L.R. 894, thus:

> "To the common-law liability for negligence, contributory negligence of the Plaintiff is ordinarily a good defense. The question has frequently arisen as to whether the same rule applies where the duty of care arises not under the common law rules of negligence but under statutes prescribing or proscribing a course of conduct, without reference to whether such conduct or its omission would have constituted negligence at common law."

This question was answered for Nevada in *Styris v. Folk,* 62 Nev. 208 at 219, 139 P.2d 614:

> "There is no difference in principle as to the effect of negligence whether arising by violation of an ordinance, or by ordinary negligence."

The Court then cited with approval the following language from *Smith v. Zone Cabs,* 135 Ohio St. 415, 21 N.E.2d 336:

> "Negligence per se and proximate cause are two separate and distinct issues. *One is presumed as a matter of law,* the other must, nevertheless, be proved as a matter of fact." (Emphasis supplied.)

The evidence is uncontradicted that the headlights of the Cudahy truck were on low beam at all times. When the Cudahy truck was halfway down the little

hill, about a mile away, the P.M.T. driver flashed a warning signal with his lights. (T. 90.) As if in response, Cudahy's driver switched his headlights from low beam to high beam and back to low beam again. (T. 91.) Thus, the Cudahy truck lights were on low beam when the truck topped and started down the hill and were returned to low beam after giving the only signal given by him, nearly a mile from the point of impact. (T. 90.) That near mile was driven by the Cudahy driver, his lights obviously on low beam, at a constant speed of 57 miles an hour. (T. 44; 45; 54; 55.)

N.R.S. 484.410 requires that the driver at nighttime use a distribution of light, or composite beam, high enough and of sufficient intensity to reveal persons and vehicles at a safe distance in advance of the vehicle. Dodd ignored this requirement and proceeded for nearly a mile at a steady 57 miles per hour with his lights on low beam until he collided with Appellants' vehicle in a 55 mile per hour zone. (T. 20.) He did not see the reflector on the side of the trailer until it was immediately in front of him, or as he said to cross-examining counsel, "As close as from me to you." (T. 42; 53.) If indeed Appellants' trailer lights were off (Dodd asserts they were off although Morrow states they were on), couldn't Dodd have seen the trailer reflector sooner had his lights been on high beam?

N.R.S. 484.400.1 requires that the high beam of a vehicle be so aimed and of such intensity as to reveal persons and vehicles at a distance of at least 350 feet

ahead. Assuming that the Cudahy headlights were in a condition which conformed to the Nevada Statute, the use of them as prescribed by the statute, i.e., on high beam, would have revealed the stalled trailer to the Cudahy driver when he was 350 feet away. That is more than three times the distance of his pre-collision skid marks. (Plaintiff's Exhibit 4; T. 20.)

The Court did not consider whether the conduct of Dodd was in any way the proximate cause of the collision and resulting damage. Rather, it merely found Dodd not to have been negligent, necessitating no further inquiry into his conduct. It is urged that this is clearly erroneous upon an examination of the record; that the trial Court should have concluded that Appellee's driver and agent was contributorily negligent as a matter of law and then made a determination whether this contributory negligence was the proximate cause of the collision.

B. A Consideration Under the Doctrine of Range and Vision.

Nevada has adopted the so-called range of vision rule as set forth in *Burlington Transportation Company v. Wilson,* 61 Nev. 22, 110 P.2d 211, 114 P.2d 1093 and in *Rocky Mountain Produce Company v. Johnson,* 78 Nev. 44, 369 P.2d 198. The rule is succinctly stated in *Tracy v. Pollock,* 79 Nev. 361 at 364, 385 P.2d 340: "It is the duty of a driver of a motor vehicle using a public highway in the nighttime to be vigilant at all times and to drive at such rate of speed and to keep the vehicle under such control that, to avoid a collision, he can stop within the distance the

highway is illuminated by its lights." The Court in a footnote added "the distance of one's range of vision over Nevada deserts, because of the unobstructed vastness, may be difficult for many to comprehend."

In the *Tracy* case Defendant driver estimated his speed at 50 miles an hour. He had his lights on low beam. He saw a stalled vehicle in his lane ahead when he was 100 feet away. He applied his brakes and collided with the stalled vehicle. In the present case Defendant driver estimated his speed at 57 miles per hour. (T. 44; 45; 54; 55.) His lights were on low beam. (T. 91.) He saw a stalled vehicle in his lane ahead when he was "right there" (T. 53), a distance away which didn't seem to him to be as much as 113 feet. (T. 42.) He applied his brakes and collided with the stalled vehicle. (T. 43; 61.)

Dodd, by his own admission, was out-driving his headlights. The Court is urged that he is clearly contributorily negligent and that the Court's finding to the contrary is clearly erroneous under the rules hereinabove stated.

Actually, it is not as if the trial Court considered the conduct of Dodd and found him free of contributory negligence notwithstanding that conduct. Rather, the trial Court seemed to find Appellants liable without considering Dodd's conduct. Upon announcing its decision, the Court added, "There is a lot more to how a lawsuit looks to a Judge or a jury than what you read in the books; and although I know it is important to analyze the case carefully, generally speak-

ing this type of case, if somebody leaves an obstruction in the middle of a busy transcontinental highway, there isn't much you can say to defend him." (T. 159.)

CONCLUSION

The Court is urged that the judgment herein be reversed and the cause remanded with instructions to enter judgment for Appellants.

Dated, Reno, Nevada,
July 5, 1967.

Respectfully submitted,
GUILD, GUILD & CUNNINGHAM,
Attorneys for Appellants.

CERTIFICATE OF COUNSEL

We certify that, in connection with the preparation of this brief, we have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in our opinion, the foregoing brief is in full compliance with those rules.

GUILD, GUILD & CUNNINGHAM,
Attorneys for Appellants.

(Appendix Follows)

Appendix

Appendix

TABLE OF EXHIBITS

PLAINTIFF'S EXHIBITS:

Exhibit		Transcript Page
1	Tachometer	Pretrial Conference
4	Nevada Highway Patrol Accident Form	9
5	Motor Vehicle Accident Form	11
6	Statement of W. E. Bailey	13
7	Nevada Highway Patrol Accident Report	Pretrial Conference
8	Photograph	27
9	Photograph	27
10	Photograph	27
11	Photograph	27
12	Statement of Wayne Morrow	103

DEFENDANT'S EXHIBITS:

Exhibit		Transcript Page
A	Photograph	19
B	Photograph	19
C	Photograph	19
D	Photograph	59
E	Photograph	59